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KNOBBE MARTENS OLSON & BEAR LLP
2040 MAIN STREET
FOURTEENTH FLOOR
IRVINE, CA 92614

EXAMINER	
SMITH, PRESTON	

ART UNIT	PAPER NUMBER
1794	

NOTIFICATION DATE	DELIVERY MODE
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

jcartee@kmob.com
eOAPilot@kmob.com

Office Action Summary	Application No.	Applicant(s)	
	10/568,044	ARNOULD ET AL.	
	Examiner	Art Unit	
	PRESTON SMITH	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *18 August 2006*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *16-34* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *16-34* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *02/13/2006*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claim Objections

Claims 16, 18, and 24 and their dependent claims objected to because they refer to a table in the specification. Incorporation by reference to a specific figure or table "is permitted only in exceptional circumstances where there is no practical way to define the invention in words and where it is more concise to incorporate by reference than duplicating a drawing or table into the claim. Incorporation by reference is a necessity doctrine, not for applicant's convenience." *Ex parte Fressola*, 27 USPQ2d 1608, 1609 (Bd. Pat. App. & Inter. 1993) (citations omitted). The claims should be amended to include the tables to which they are referring.

Appropriate action is required.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 16, 18, and 24 and their dependent claims rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claims refer back to tables 4 and 5, that could have its contents changed during prosecution

and therefore, the metes and bounds of the claims would never be met. Also, it is not clear what properties or features would produce the values indicated in tables 4 and 5 and it is not clear what the values indicated in the tables actually mean. Furthermore, it is not clear as to what is encompassed by terms such as "very high surface texture" and "very high shape stability" discussed in claims 16, 18, 24 and their dependent claims.

Referring to claims 21-24, it is not clear how the properties claimed by the references to tables 4 and 5 would make the emulsion storable at temperatures up to 20 C.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 16-20, 25-28, 31-34 rejected under 35 U.S.C. 102(b) as being anticipated by Richard Robert Leshik, US-Patent 6,117,473.

Referring to claim 16, Leshik teaches a non–dairy, refrigerator stable foam formulated from water, vegetable oil, and an emulsifier in the abstract. This is equivalent to a non-dairy vegetable oil in water emulsion. Also as mentioned in column

3, lines 39-45, the ingredients containing vegetable oil are combined with water to form an homogenized emulsion. The product is for whipping as mentioned in column 3, line 15). Also, the emulsion is UHT treated as seen in column 3, line 49. It is considered that since the invention of Leshik contains all of the claimed ingredients, it would have a very high shape stability after whipping as indicated in table 4 of applicants specification (since the stability index measurement would be calculated according to applicant's procedure).

Referring to claim 17, for reasons described in examiner's address of claim 16, the emulsion would have what applicant refers to as a very high shape stability index (this corresponds to a stability index of 55-60 as mentioned in applicant's specification).

Referring to claim 18, Leshik teaches a non–dairy, refrigerator stable foam formulated from water, vegetable oil, and an emulsifier in the abstract. This is equivalent to a non-dairy vegetable oil in water emulsion. Also as mentioned in column 3, lines 39-45, the ingredients containing vegetable oil are combined with water to form an homogenized emulsion. Also, the emulsion is UHT treaded as seen in column 3, line 49. It is considered that since the invention of Leshik contains all of the claimed ingredients, it would have a very good surface texture as indicated by table 5 (or an average score of 5 to 6 as mentioned in applicant's specification).

Referring to claim 19, for reasons stated in examiners address of claim 18, the emulsion would have a very good surface texture as indicated by table 5 (or an average score of 5 to 6 as mentioned in applicant's specification).

Referring to claim 20, Leshik teaches an overrun value of 50-350% in the abstract. 350% encompasses the claimed range of at least 3.5 (350%).

Referring to claim 25, Leshik teaches polysorbate 60 (column 2, line 30).

Referring to claim 26, Leshik teaches guar gum (column 2, line 56).

Referring to claim 27, Leshik teaches sweetener (sucrose, which is table sugar, is mentioned as a possible sweetener in column 1, line 67 so it is considered that the table in column 3, lines 5-10 teaches all of the sweeteners taught by Leshik in the range taught by Leshik in this table) in a weight percentage of 0.05-40 % (column 3, line 28, the table) and vegetable oil (fat) in a range from 2-30% (column 3, line 7, the table). Since these ranges substantially overlap the claimed ranges, it is considered that the ranges of Leshik anticipate the claimed ranges.

Referring to claim 28, Leshik teaches whipping the components taught in examiner's address of claim 16 (column 3, line 15). The resulting product would be a whipped product.

Referring to claim 31, Leshik teaches a pudding decorated with the whipped topping which is made from the emulsion mentioned in examiner's address of claim 16 (column 4, line 13-14 and abstract).

Referring to claim 32, Leshik teaches a pudding decorated with the whipped topping which is made from the emulsion mentioned in examiner's address of claim 16 (column 4, line 13-14 and abstract).

Referring to claim 33, Leshik teaches a pudding decorated with the whipped topping which is made from the emulsion mentioned in examiner's address of claim 18 (column 4, line 13-14 and abstract).

Referring to claim 34, Leshik teaches a pudding decorated with the whipped topping which is made from the emulsion mentioned in examiner's address of claim 20 (column 4, line 13-14 and abstract).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 21-24 rejected under 35 U.S.C. 103(a) as being unpatentable over Richard Robert Leshik, US-Patent 6,117,473 in view of Itaru Murase, US-Patent 4,461,777.

Referring to claim 21, Leshik teaches the contents mentioned in examiner's address of claim 16 and teaches using oils made by hydrogenation in the abstract and teaches that the emulsion is free of protein (column 1, line 38). Leshik fails to teach using oil containing less than 2% trans fatty acids. Murase teaches three ways the oils usable with this invention can be processed: hydrogenation, distillation, and rearrangement (column 3, lines 4-6). Each way corresponds to a different embodiment of the oil and the only one that would result in the production of trans fats (and thus trans fatty acids) in the oil is hydrogenation and thus, Murase teaches two non trans fat containing embodiments, both workable with the invention of Leshik. It would have

been obvious to one of ordinary skill in the art at the time of the invention to combine the inventions of Murase and Leshik by selecting an oil processed via distillation or rearrangement over the oil processed via hydrogenation taught in Leshik in order to avoid the production of trans fats (and thus trans fatty acids) since trans fats are known to raise low density cholesterol levels in the blood which leads to heart disease. An oil containing no trans fats contains essentially 0 % trans fatty acids which is less than 2% trans fatty acids.

Additionally, Leshik teaches that the emulsion mentioned in examiner's address of claim 16 is cooled below 26.7 C (column 3, line 50) and is refrigerated at 4.4 C (column 4, line 2) (and thus storable at temperatures within these ranges). It is thus considered that the invention of Leshik is storable at temperatures up to 20 C and thus the invention of Leshik in view of Murase would be storable at temperatures up to 20 C since the use of oils containing less than 2% trans fats is not considered to impart any physical or chemical property which would make the invention of Leshik in view of Murase not storable at temperatures up to 20 C.

Referring to claim 22, Leshik teaches the contents mentioned in examiner's address of claim 18 and teaches using oils made by hydrogenation in the abstract and teaches that the emulsion is free of protein (column 1, line 38). Leshik fails to teach using oil containing less than 2% trans fatty acids. Murase teaches three ways the oils usable with this invention can be processed: hydrogenation, distillation, and rearrangement (column 3, lines 4-6). Each way corresponds to a different embodiment

of the oil and the only one that would result in the production of trans fats (and thus trans fatty acids) in the oil is hydrogenation and thus, Murase teaches two non trans fat containing embodiments, both workable with the invention of Leshik. It would have been obvious to one of ordinary skill in the art at the time of the invention to combine the inventions of Murase and Leshik by selecting an oil processed via distillation or rearrangement over the oil processed via hydrogenation taught in Leshik in order to avoid the production of trans fats (and thus trans fatty acids) since trans fats are known to raise low density cholesterol levels in the blood which leads to heart disease. An oil containing no trans fats contains essentially 0 % trans fatty acids which is less than 2% trans fatty acids.

Additionally, Leshik teaches that the emulsion mentioned in examiner's address of claim 18 is cooled below 26.7 C (column 3, line 50) and is refrigerated at 4.4 C (column 4, line 2) (and thus storable at temperatures within these ranges). It is thus considered that the invention of Leshik is storable at temperatures up to 20 C and thus the invention of Leshik in view of Murase would be storable at temperatures up to 20 C since the use of oils containing less than 2% trans fats is not considered to impart any physical or chemical property which would make the invention of Leshik in view of Murase not storable at temperatures up to 20 C.

Referring to claim 23, Leshik teaches the contents mentioned in examiner's address of claim 16 and teaches using oils made by hydrogenation in the abstract and

teaches that the emulsion is free of protein (column 1, line 38). Leshik fails to teach using oil containing less than 2% trans fatty acids. Murase teaches three ways the oils usable with this invention can be processed: hydrogenation, distillation, and rearrangement (column 3, lines 4-6). Each way corresponds to a different embodiment of the oil and the only one that would result in the production of trans fats (and thus trans fatty acids) in the oil is hydrogenation and thus, Murase teaches two non trans fat containing embodiments, both workable with the invention of Leshik. It would have been obvious to one of ordinary skill in the art at the time of the invention to combine the inventions of Murase and Leshik by selecting an oil processed via distillation or rearrangement over the oil processed via hydrogenation taught in Leshik in order to avoid the production of trans fats (and thus trans fatty acids) since trans fats are known to raise low density cholesterol levels in the blood which leads to heart disease. An oil containing no trans fats contains essentially 0 % trans fatty acids which is less than 2% trans fatty acids.

Additionally, Leshik teaches that the emulsion mentioned in examiner's address of claim 16 is cooled below 26.7 C (column 3, line 50) and is refrigerated at 4.4 C (column 4, line 2) (and thus storable at temperatures within these ranges). It is thus considered that the invention of Leshik is storable at temperatures up to 20 C and thus the invention of Leshik in view of Murase would be storable at temperatures up to 20 C since the use of oils containing less than 2% trans fats is not considered to impart any physical or chemical property which would make the invention of Leshik in view of Murase not storable at temperatures up to 20 C.

Referring to claim 24, Leshik teaches the contents mentioned in examiner's address of claim 16 and teaches using oils made by hydrogenation in the abstract and teaches that the emulsion is free of protein (column 1, line 38). Leshik fails to teach using oil containing less than 2% trans fatty acids. Murase teaches three ways the oils usable with this invention can be processed: hydrogenation, distillation, and rearrangement (column 3, lines 4-6). Each way corresponds to a different embodiment of the oil and the only one that would result in the production of trans fats (and thus trans fatty acids) in the oil is hydrogenation and thus, Murase teaches two non trans fat containing embodiments, both workable with the invention of Leshik. It would have been obvious to one of ordinary skill in the art at the time of the invention to combine the inventions of Murase and Leshik by selecting an oil processed via distillation or rearrangement over the oil processed via hydrogenation taught in Leshik in order to avoid the production of trans fats (and thus trans fatty acids) since trans fats are known to raise low density cholesterol levels in the blood which leads to heart disease. An oil containing no trans fats contains essentially 0 % trans fatty acids which is less than 2% trans fatty acids.

Additionally, Leshik teaches that the emulsion mentioned in examiner's address of claim 16 is cooled below 26.7 C (column 3, line 50) and is refrigerated at 4.4 C (column 4, line 2) (and thus storable at temperatures within these ranges). It is thus considered that the invention of Leshik is storable at temperatures up to 20 C and thus

the invention of Leshik in view of Murase would be storable at temperatures up to 20 C since the use of oils containing less than 2% trans fats is not considered to impart any physical or chemical property which would make the invention of Leshik in view of Murase not storable at temperatures up to 20 C.

Claims 29-30 rejected under 35 U.S.C. 103(a) as being unpatentable over Richard Robert Leshik, US-Patent 6,117,473 in view of Khalil M. Moussa, US-Patent 6,833,231.

Referring to claim 29, Leshik teaches the contents of examiner's address of claim 28 and Leshik teaches whipping in a whipping Contherm (column 3, lines 50-51). It would have been obvious to one of ordinary skill in the art at the time of the invention to use the Kenwood Major Classic mixer instead a whipping Contherm to carry out the whipping of the product of Leshik because both the Kenwood Major Classic mixer and a whipping Contherm are known whipping device that are used to whip food products and using one whipping device over the other would be a simple substitution of one known whipping device for another to achieve desired whipping.

Again **referring to claim 29,** Moussa does not explicitly teach using whipping speeds of 1 to 2 during 30 seconds to 2 minutes and then speeds of 3 to 5 until optimal consistency is reached however one of ordinary skill in the art at the time of the

invention would have realized that speeds around this range would have to be used in order to ensure optimal whipping and further one of ordinary skill would recognize that the speeds could be adjusted depending on the sort of features in the whipped emulsion one of ordinary skill desired.

Referring to claim 30, since the Kenwood Major classic can be used for creating whipped toppings, it would be obvious to one of ordinary skill in the art to use this device to obtain a whipped topping for adding to products such as frozen deserts to make them more aesthetically pleasing to consumers.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to PRESTON SMITH whose telephone number is (571)270-7084. The examiner can normally be reached on Mon-Fr 5:30-3:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Carol Chaney can be reached on 571-272-1284. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Drew E Becker/
Primary Examiner, Art Unit 1794

prs